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IN THE

Supreme Court of the United States

PIRELLI ARMSTRONG TIRE CORPORATION,
Petitioner,

v.

CLAY K. JAMES, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an employer breach its ERISA fiduciary duty when, having expressly reserved its right to change an ERISA plan in the plan documents, it later accurately describes future benefits under the terms of the existing welfare plan without repeating that it has the power to change the plan, and still later exercises its right to change benefits?

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PETITION FOR A WRIT OF CERTIORARI

The Sixth Circuit's decision—that Pirelli Armstrong Tire Corporation breached its fiduciary duty when it accurately informed employees that its ERISA plan provided a certain level of benefits for life, and because it recommended the plan and later changed some of those benefits in accordance with its expressly reserved right to amend or terminate those benefits—is an egregious misapplication of the ERISA fiduciary duty standard and is in conflict with the authority of other circuits. It cannot be reconciled with other circuits' holdings that an employer does not breach its fiduciary duty when it fails to accompany an accurate description of future plan benefits with a repetition of its right to amend or terminate the plan contained in the plan documents. The court of appeals' decision threatens to undermine the holdings of those circuits, and to injure both employers and

employees, by making companies in different circuits subject to varying standards in administering ERISA plans, and making companies with multi-state operations simultaneously subject to differing standards in administering a single plan.

The decision below also, as a practical matter, has placed an impossible burden on ERISA fiduciaries. If the decision stands, any accurate oral description of future benefits under the plan's existing terms, if unaccompanied by a repetition of the administrator's right to change the plan, will effectively vest those benefits to employees who hear and rely on the description and thereby vitiate the reservation of rights contained in the written plan documents. Congress's intent to encourage employee-benefit plans by giving employers the flexibility to use welfare benefit plans will be severely undercut, and employers will be discouraged from counseling employees about benefit plans, or even from providing them at all. For the many ERISA plan employers who are unaware of the decision below, it creates the potential for enormous and unintended liabilities, even for those employers who accurately and in good faith simply describe existing benefits. Accordingly, the Court should grant certiorari and reverse the decision below.

CITATION OF COURT OF APPEALS OPINION

James v. *Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (CA6 2002).

BASIS FOR JURISDICTION

The United States Court of Appeals for the Sixth Circuit delivered its judgment and opinion in *Pirelli* on March 20, 2002. The petition for rehearing en banc was denied on December 11, 2002. The Court has jurisdiction to hear this petition for certiorari under 28 U.S.C. §1254.

STATUTES INVOLVED

"(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title)."

29 U.S.C. §1104.

STATEMENT OF THE CASE

Pirelli operated a tire production facility in Madison, Tennessee. All of the plaintiffs below were salaried employees at the Madison plant. Armstrong purchased the plant in 1973 from Gates Rubber; and Pirelli acquired the plant in 1988. App. 31a, 32a.

Armstrong provided medical benefits for its salaried employees and retirees through group insurance contracts with Connecticut General Life Insurance Company. Through 1992, employees of the plant (under both Pirelli and the former ownership) always received the same medical benefits after retirement that they had received when they retired. App. 31a-34a. Each of the 1980, 1984, and 1988 policies with Connecticut Life, however, expressly authorized the amendment or termination of the policies by Armstrong. App. 31a-32a. In 1981, Armstrong gave each of its salaried employees a summary plan description (SPD) describing medical benefits. The 1981 SPD included a provision expressly notifying the employees that Armstrong reserved the right to terminate medical benefits. App. 31a. In 1989, Pirelli distributed a new SPD that contained an express reservation of Pirelli's right to modify or terminate the medical benefit plan at any time. App. 33a. Each of the respondents was given one of the SPDs containing a reservation-of-rights clause. App. 31a-32a.

In July 1990, Pirelli implemented its Optional Pension/ Severance (OPS) program, which was designed to reduce the number of salaried employees by providing incentives to voluntary retirement. App. 32a.[1] Pirelli provided written

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[1] In late 1989, Pirelli announced that there would be changes in the method of calculating deductibles and out-of-pocket maximums for those who retired after January 1, 1991. Later in 1990, Pirelli announced and held meetings to inform employees about the OPS program. The OPS program was designed to provide retirement incentives, including the "bridging" of age or service to enable those not yet eligible for full

descriptions of the OPS program to its salaried employees. In addition, corporate headquarters gave information to Pirelli's plant managers to present to salaried employees. That information included a script for the plant manager to read to the employees at group meetings, a slide presentation, and a recorded audio presentation. App. 34a.

The plan was described to respondents in 1990 by either Charles Wright, the plant manager, or Shirley Pike, a human resources liaison. Respondents claimed that in individual conversations with Wright, Pike, or both, they were told that their health benefits would continue "for life," "for the term of their retirement," or "during retirement," and that when asked about benefits, Pike and Wright did not repeat the reservations of rights contained in the SPDs.[2] No respondent

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pensions to receive unreduced pensions anyway. The OPS program also included certain enhanced insurance benefits for vision care and dental care as well as severance pay. App. 35a. Like all others who retired before the end of 1990, OPS retirees avoided the changes in deductibles and out-of-pocket maximums that went into effect on January 1, 1991. In addition, those OPS retirees who elected to participate in the program in 1990 but whose actual retirement was postponed by agreement with Pirelli until after January 1, 1991, still received the pre-1991 formula for deductibles and out-of-pocket maximums. The enhanced benefits for OPS retirees were delivered and are not the subject of this lawsuit. App. 37a. Similarly, the changes in the method of calculating deductibles and out-of-pocket maximums on January 1, 1991, did not affect the plaintiffs and are not the basis of the plaintiffs' claims.

[2] The district court found that Shirley Pike, in describing Pirelli's plan to pay retirees medical benefits until their death, told Clay James, Ernest Custer, John G. Carney, Dean Carney, Ruby Panzera, Andrew Panzera, B. L. Cook, Robert Adkins, Paul Skelley, Jr., Doyle Denton, Dewey Meador, Bobby Richardson, Ron Fitzsimmons, Leroy Kemp, James Wallace, and Vada Haston that they and, if applicable, their spouses would retain their medical benefits "for life." App. 38a-39a. The district court found that Donald Rosso was told the same thing by Charles Wright. App. 38a. Joe Smith alleges that Pike told him "she thought there was a change coming and if you was going to retire, 1990 would be the time to get out," although the district court made no findings in regard

ever alleged or testified that a Pirelli representative told them that the ERISA plan "could not" be changed. App. 37a-39a.

The district court found that Ms. Pike misinterpreted and misstated the reservation-of-rights clause contained in the SPD to two plaintiff-employees by indicating that it referred only to the employer's right to switch insurers. App. 48a-49a. The district court ruled in favor of those two employees, and their claims have been settled. *Id.* The district court, however, after a full trial on the merits, found no similar inquiries by or misstatements to any of the plaintiffs who were parties on appeal. App. 54a-55a. Furthermore, none of those plaintiffs had any information or offered any evidence suggesting either that they were deliberately misled by Pirelli officials or that Pirelli had any plans, at the time of the conversations or when they retired, to modify their retiree medical benefits years later. *Id.*

Nearly two years later, in November 1992, the President and CEO of Pirelli presented its board of directors with a proposal for a new health care plan, which changed the plan's medical benefits terms for both current employees and retirees such as respondents. In 1993, Pirelli adopted the new plan. App. 37a.

At trial, plaintiffs did not allege that their medical benefits had been terminated, or even that the coverage had been reduced; rather, they alleged that the 1993 plan change caused an increase in their health care costs by increasing their share of the payments under the welfare plan. Plaintiffs sued Pirelli for breach of the benefits plan, breach of fiduciary duty, equitable estoppel, breach of contract, and failure to comply with ERISA's requirement to supply

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to Smith. *See* App. 10a, 38a. In fact, the changes in the method of calculating deductibles and out-of-pocket maximums implemented on January 1, 1991, did not affect Smith or anyone else who retired before that date, including the OPS retirees.

written information describing plan benefits. App. 39a-40a. The district court granted summary judgment for Pirelli on the breach-of-plan claim, and after a full bench trial, rendered judgment for Pirelli on all claims, except as to the two plaintiffs who had inadvertently been given an incorrect interpretation of the reservation-of-rights clause by Pike. App. 55a.

The court of appeals reversed, holding that Pirelli breached its fiduciary duty to plaintiffs. The court of appeals did not address the district court's factual findings regarding the meaning of the various communications between Wright, Pike, and the plaintiffs, concluding instead that those communications, by failing to volunteer the existence of rights set out in the plan documents, were misrepresentations as a matter of law. App. 28a.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to clarify the nature of the fiduciary duty owed to present and former employees under an ERISA welfare plan. When an employer offers a welfare plan for employees, it is necessary to accurately inform employees about the benefits that the plan will offer employees in the future, but those benefits are not vested and the employer generally reserves the right to unilaterally modify the terms of the plan. Whenever an employer modifies an ERISA welfare plan, the future benefits an employee enjoys necessarily will be different from those explained (truthfully) prior to the modification.

Pirelli's welfare plan provided benefits to employees and retirees for the rest of their lives. App. 33a-34a, 38a-39a. When Pirelli told employees that they would enjoy the benefits of its welfare plan "for life," "for the term of their retirement," or "during retirement," those statements accurately reflected the terms of the welfare plan. *Id.* When the court of appeals held that those statements constituted a

breach of fiduciary duty as a matter of law, the court imposed an affirmative duty on Pirelli not only to accurately explain to respondents the future benefits under the plan—which it did, as the district court found—but also to volunteer a uniform disclaimer, repeating the language that already appeared in the plan providing that those benefits could be modified in the future, even when the right to modify had not been raised by either Pirelli or respondents.

The court of appeals' holding is squarely at odds with the holdings of other circuits that an employer who is accurately describing plan benefits need not warn about the possibility of future changes, or even disclose potential changes that may have been raised internally unless those plans are under "serious consideration." The decision also conflicts with other circuits' holdings that there is a strong presumption against interpreting an employer's oral comments in such a way as to vest benefits. As a practical matter, if employees can successfully sue for breach of fiduciary duty based on a theory of misrepresentation by omission in an accurate oral communication, then employers, who by law retain the right to alter ERISA welfare plans, will effectively lose that right. ERISA's statutory requirement that the plan be written will be undermined, and countless employee lawsuits will arise arguing that benefits will be vested not by what an employer said, but by what the employer did not say, and about which the employee did not even ask.

Indeed, if faced with the possibility that a representative's accurate description of future benefits can effectively vest benefits, many employers may choose either not to meet with employees to discuss plan benefits or simply not to provide ERISA-qualified welfare plans at all. The Court should therefore grant certiorari to clarify the duty owed when an ERISA fiduciary describes future benefits.

I. ERISA DOES NOT IMPOSE A GENERAL DUTY TO WARN ABOUT POTENTIAL FUTURE CHANGES IN BENEFITS.

A. The Courts of Appeals Are in Conflict on the Disclosure Obligations of ERISA Fiduciaries Regarding Potential Future Changes in Benefits.

Given the popularity of ERISA welfare benefit plans, the fact pattern presented by this case arises with predictable regularity. Frequently, an employer accurately orally describes a plan to its employees, and then later reconsiders and decides to amend the plan pursuant to its reserved right to terminate or amend the plan contained in the official plan documents. At that time, the employer's previous description of the plan becomes obsolete and is superseded by the new plan.

It is not uncommon for an employee or retiree in this situation to sue on the theory that the then-accurate oral description of plan benefits effected a contract never to change benefits or that the initial accurate description of benefits was a misrepresentation of future benefits under the plan. Despite the frequency of this type of litigation, the circuits have not reached a consensus on how to deal with it. Indeed, the situation is so confused that two circuits —the Sixth and the Third—have cases on both sides of the issue. The decision in this case further confuses the legal landscape.

The majority of courts have declined to hold an employer liable when, after a plan change, an employee alleges that an earlier description of plan benefits was a breach of fiduciary duty by misrepresentation. Most courts have recognized that employers generally retain the ability to terminate or amend ERISA welfare plans and that a temporal statement regarding the duration of benefits under a plan should not be interpreted as either a vesting of the benefits or a waiver of

the employer's right to terminate or amend the plan. *See Frahm* v. *Equitable Life Assurance Soc. of United States*, 137 F.3d 955, 959-60 (CA7 1998) (holding that when employer described benefits using the word "lifetime," but omitted to repeat that the employer reserved the right to terminate the plan, and the plan was later terminated, there had been no breach of fiduciary duty); *Wilson* v. *Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (CA8 1995); *Sprague* v. *Gen. Motors Corp.*, 133 F.3d 388, 394 (CA6 1998) (en banc); *but see* App. 29a; *Nester* v. *Allegiance Healthcare Corp.*, 315 F.3d 610, 614 (CA6 2003) (Clay, J., concurring) (stating in dicta that, while plaintiffs' breach claim necessarily failed, under *James* plaintiffs might have brought successful breach of fiduciary duty claim under plan offering eight years of special transition contributions, which ended when plaintiffs were later terminated); *Abbruscato* v. *Empire Blue Cross & Blue Shield*, 274 F.3d 90, 94-95 (CA2 2001) (holding that jury could find a breach of fiduciary duty when employer reduced retiree insurance coverage, because plan language recited that the coverage would "remain[] in force for the rest of your life," notwithstanding language reserving right to terminate or amend the plan); *Devlin* v. *Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88-89 (CA2 2001) (same); *In re Unisys Corp. Retiree Med. Ben. ERISA Litig.*, 57 F.3d 1255, 1259 (CA3 1995) ("*Unisys I*") (holding that employer breached its fiduciary duty when it reduced benefits because plan language indicated that benefits would "be continued for the rest of your life," notwithstanding language reserving right to terminate or amend plan).

A statement describing the duration of benefits under an ERISA welfare plan cannot reasonably be interpreted as an additional, implied representation that the employer will not subsequently change those benefits. An employer has no duty of "prevision;" that is, the employer does not make a misrepresentation by failing to inform employees of a change that it was not, at that time, even contemplating making. *See*

Frahm, 137 F.3d, at 959-60; *cf. Flanigan* v. *Gen. Elec. Co.*, 242 F.3d 78, 85 (CA2 2001) ("We do not require an ERISA fiduciary to be perfectly prescient as to all future changes in employee benefits.") (quoting *Mullins* v. *Pfizer, Inc.*, 23 F.3d 663, 669 (CA2 1994)).

In *Frahm*, individual employees testified that they were given advice from corporate representatives that "stressed the availability of 'lifetime' benefits and omitted the qualifier" that the employer reserved the right to change or terminate the plan. *Id.*, at 959. Eventually, the employer changed the plan to require retirees to make copayments for some medical services. *See id.*, at 956. *Frahm* concluded that construing the earlier communications as a breach of fiduciary duty would impose an impossible burden on the employer because of the difficulties of describing benefits that were intended and designed to extend indefinitely, but which the employer retained the right to change:

> "Plans are complex, and the possibility of change in the plans makes exposition and decision difficult. How best should a benefits department express the idea that although it is the employer's current *policy* to freeze the benefits of retirees, this is not its legal *obligation*? Many persons . . . won't grasp the difference when the policy has been unchanged for decades." *Id.*, at 959.

Frahm concluded that finding a misrepresentation based on the employer's then-accurate use of the word "lifetime" to describe benefits would create a doctrine of misrepresentation by omission, and imposition of liability because "the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." *Frahm*, 137 F.3d, at 960 (quoting *Sprague*, 133 F.3d, at 405). Accordingly, the court refused to find a breach of fiduciary duty when the employer accurately described future benefits,

did not repeat its expressly reserved right to alter or terminate the plan, and later changed the plan.

Many circuits have gone even further in protecting employers from charges that, in describing a plan that was later changed, the employer made a misrepresentation. The Seventh, Eighth, and, prior to this decision, the Sixth Circuits have held that an employer asked about future changes in benefits plan need not repeat a reservation of rights already contained in the plan documents. Many circuits have held that an employer, when faced with the same question, need not even disclose the fact that it is considering plan changes until those changes are under "serious" consideration. *Mushalla* v. *Teamsters Local No. 863 Pension Fund*, 300 F.3d 391, 396 (CA3 2002); *Fischer* v. *Pa. Elec. Co.*, 96 F.3d 1533, 1539 (CA3 1996); *Bins* v. *Exxon Co. U.S.A.*, 220 F.3d 1042, 1049 (CA9 2000) (*en banc*); *Hockett* v. *Sun Co., Inc.*, 109 F.3d 1515 (CA10 1997); *Barnes* v. *Lacy*, 927 F.2d 539, 544 (CA11 1991); *cf. Mullins*, 23 F.3d at 668 (CA2 1994). Thus, while employers in the Sixth Circuit must respond to questions about future benefits with a repetition of a right *made clear in the plan documents*, employers in the Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits could respond to that question without even disclosing initial consideration of plan changes that employees *would have no reason to know about*. *Id.*; App. 27a-28a.

This decision not only disrupts the holdings of these circuits by subjecting employers to varying standards in different jurisdictions, but also upsets the settled expectations of the employers and employees who do business in them. Employers in different circuits are subject to different rules, and even a single employer who operates across the circuits is subject to conflicting requirements in administering a single plan. A Memphis-based employer with plants in St. Louis and Chicago, for instance, would be subject to different rules. Suppose employees in St. Louis and Chicago are

accurately told that the company's welfare plan provides certain medical benefits for life; no contemplated modification was under serious consideration at the time the statement is made to the employees; no one asks and the employer simply does not mention any rights to amend or terminate that were expressly reserved in the plan, as confirmed in the SPDs; and pursuant to such rights, the company later modifies those benefits. If the employees later sue alleging a breach of fiduciary duty, the company will be entitled to summary judgment, *if* the employees sue in St. Louis and Chicago. *See Wilson*, 55 F.3d, at 405; *Frahm*, 137 F.3d, at 959-60. But, if the employees sued in Memphis instead, the employees, not the employer, would win as a matter of law under the court of appeals' decision. In other words, the simple decision whether to file suit in Chicago or Memphis would decide, as a matter of law, whether the employee or employer won the lawsuit, thus raising the likelihood of forum shopping by employees.

B. If Accurate Descriptions of Future Non-Vested Benefits, in the Absence of an Express Recitation of the Right to Amend, Are Interpreted as Affirmative Misinterpretations, Then Every Description Will Vest Benefits.

The court of appeals predicated its holding both on the theory that Pirelli committed a misrepresentation by omission and on the theory that Pirelli affirmatively misrepresented its power to change the plan. App. 27a. But if the language used by Pirelli is interpreted to indicate that it lacked the power to change benefits, then every oral statement by an employer representative accurately describing future benefits under a plan as it then exists must be understood to vest those benefits.

In contrast to the court of appeals, the district court found a breach of fiduciary duty *only* as to the only two employees who received an inaccurate answer from Pike as to whether

Pirelli could amend the plan. App. 55a. These two employees were not appellants below. App. 12a. Nevertheless, the court of appeals found that Pirelli had made misrepresentations to *all* of the plaintiffs, without relying on the district court's findings as to the meaning of the communications at issue. App. 27a. Nor did the court remand to the trial court for it to make a finding on the meaning or the specific contents of the language Pike and Wright used with appellants. *Id.* Instead, the court of appeals concluded that what Pike and Wright said was a misrepresentation as a matter of law.

But the only way that the alleged statements at issue in this case can be understood as affirmative misrepresentations, and not misrepresentations-by-omission, is if the phrase "for life" were understood to indicate not the existing terms of the plan, but the totally distinct concept (contradicting the express plan documents and summaries) that Pirelli "could not" change the plan. The court of appeals, attempting to bring the facts within the affirmative misrepresentation line of cases, reached exactly that conclusion. App. 27a ("Pike provided inaccurate information when she indicated to employees that the company could not change their benefits during retirement."). But the court did not explain how the phrase "for life" indicates that Pirelli had surrendered its previously (and expressly) reserved power to change the plan. *Id.* Nor did the court explain why it ignored the findings of fact of the district court, which, after a full bench trial, found that Pirelli had *not* indicated to respondents—as opposed to the two plaintiffs who prevailed below—that it could not change the plan. App. 37a-39a.

The use of the phrase "for life"—which did accurately describe the plan provisions then extant—did not indicate that Pirelli lacked the capacity to change the plan. Rather, it conveyed the duration of the plan at the time it was described, and it did so in a way that meaningfully distin-

guished the structure of the plan from other possibilities. Specifically, as explained to the respondents, it conveyed the fact that those who retired under the OPS would receive the 1990-level deductible and out-of-pocket maximum, and that the plan was designed to pay those benefits until death. The existing plan *could* have provided, as is not uncommon, that medical benefits would terminate when an employee became eligible for Medicare, *see, e.g.*, *Maurer* v. *Joy Techs., Inc.*, 212 F.3d 907, 912 (CA6 2000), but it instead was structured to provide benefits until a retiree's death. In other words, it provided benefits "for life."

Nor does the fact that the phrase "for life" indicates that benefits will extend into the future make it qualitatively different from *any* description of future benefits. Welfare plans can be designed to terminate after a period of years, or they can be designed—as this one was—to last until death—and *somehow* this information should be conveyed to plan participants. If Pike and Wright's comments could be understood to be misrepresentations, then any phrase that indicates that welfare benefits extend into the future must similarly be accompanied by a repetition of the reservation-of-rights clause or be deemed a misrepresentation. For this reason, other courts have not generally read accurate descriptions of future benefits under an existing plan to constitute promises that those benefits cannot be cancelled. Employers who accurately describe an existing plan by noting that life insurance coverage "shall remain" at a certain figure, for instance, do not thereby inadvertently vest that benefit or incur liability for breach of fiduciary duty if the coverage is later cancelled. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., U.A.W.* v. *Skinner Engine Co.*, 188 F.3d 130, 141 (CA3 1999); *see also Sengpiel* v. *B.F. Goodrich Co.*, 156 F.3d 660, 668 (CA6 1998) (plan stating that participants "shall continue to have the same health coverage" does not vest benefits); *cf. Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851, 857 (CA4 1994) (fact

that non-plan documents "referred to retirees' benefits as 'lifetime benefits' does not nullify the company's right to modify" plan). The Seventh Circuit similarly noted that an employer's representatives' statements that benefits were "lifetime" benefits were not material misrepresentations when the plan was later changed, *see Frahm*, 137 F.3d, at 959; and the Sixth Circuit itself reached the same conclusion. *Sprague*, 133 F.3d, at 394.

Because this case does not involve an affirmative misrepresentation, it is inapposite to *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996). In *Varity*, an employer's statements were found to be misrepresentations because they inaccurately portrayed an existing set of affairs, not because they constituted inaccurate but honest predictions. The employer in *Varity*, unlike Pirelli, misrepresented an existing set of facts: it told employees that it believed the future was "bright" for a company that was offering a new plan that employers could switch into, when in fact it believed the opposite. *Id.*, at 504. Here, by contrast, when Pike and Wright told employees that their benefits were for life, it was not because they were trying to deliberately mislead them into believing that Pirelli could not change the plan, but because at the time under the plan there were benefits for life, and Pirelli had no intent to change the plan. App. 48a.

The court of appeals also relied on *Unisys I*, 57 F.3d 1255, to support its holding. App. 25a-26a. To the extent that *Unisys I* concludes that the use of the word "lifetime" was a misrepresentation of the existing plan notwithstanding that at the time the plan did provide for, and the employer intended to pay, lifetime benefits, 57 F.3d, at 1265, it is wrongly decided and itself conflicts with *Frahm* and *Gable*. *Unisys I* makes the same error the decision below did: it concluded that the use of the phrase "lifetime" was a misrepresentation without explaining how that specific language differed from the ordinary prospective language used to describe

future benefits under a plan. *Id.* *Unisys I* conflicts not only with *Sprague* and *Frahm*, but also categorically with the serious-consideration standard adopted by many courts. *See* §I.A., *supra*.

Because the language used by Pike, Wright, and the administrators in *Pirelli* is no different from any description of future benefits, the Court should grant this petition to clarify that an employer does not, under a 20/20 hindsight analysis, make a misrepresentation any time it accurately describes future benefits merely by failing to repeat its right to alter the plan that already appears in the plan documents, and then years later making a previously uncontemplated change to the plan.

II. THE DECISION BELOW UNDERMINES THE CONGRESSIONAL POLICIES UNDERLYING ERISA.

A. The Decision Below Contravenes Congressional Intent to Increase Employee Benefit Plans by Allowing Unvested Benefits.

ERISA recognizes two types of employee benefit plans: pension plans and welfare plans. *See In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 58 F.3d 896, 901 (CA3 1995) ("*Unisys II*"). Welfare plans provide "medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." Pension plans provide (i) retirement income to employees, or (ii) result in a deferral of income by employees for periods extending to the termination of covered employment or beyond. 29 U.S.C. §§1002(1), (2)(A). ERISA contains extensive vesting requirements for pension plans, but does not require automatic vesting of welfare benefit plans. *See Smith* v. *Hartford Ins. Group,* 6 F.3d 131, 136 (CA3 1993).

This was not merely an oversight on the part of Congress. Rather, vesting requirements were not established for employee welfare plans because Congress determined that "[t]o require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (CA3 1990) (quoting H.R. REP. NO. 93-807, (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4726; S. REP. NO. 93-383, (1974), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4936)). Congress foresaw that if employers addressed the uncertainties of rising medical costs and innocent misstatements "by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything could be gained [in terms of] securing broader use of employee [benefit] plans." H.R. REP. NO. 93-807 As the Second Circuit has observed:

> "Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increases in the cost of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs." *Moore* v. *Metro. Life Ins. Co.*, 856 F.2d 488, 492 (CA2 1988).

Denying employers the right to alter welfare benefit plans "would strip employers of the protection that Congress intended to provide them and accordingly 'discourage employers from offering any insurance at all.'" *Gable*, 35 F.3d, at 860 (quoting *Owens* v. *Storehouse, Inc.*, 984 F.2d 394, 398 n.5 (CA11 1993)).

The obligation imposed by the Sixth Circuit through its theory of misrepresentation by omission—as a "guarantor of

accurate information at all times and for the indefinite future," *Frahm*, 137 F.3d, at 959-60—is so broad that it threatens Congress's intent to allow unvested welfare plans. Indeed, the effect of requiring constant voluntary repetition of the fact that an employer retains the right to change a plan would be to diminish the effect of the statement itself. As courts have recognized, too low a standard of fiduciary duty "could result in an avalanche of notices and disclosures," and any potential warning "would become meaningless if cried too often." *See Bins*, 220 F.3d, at 1049 (citing *Fischer*, 96 F.3d, at 1539). Furthermore, repeated disclosure of the right even in the absence of any employer consideration of change could lead employees to incorrectly suspect that changes are being considered and thus to make decisions based on inaccurate impressions.

More problematically, a requirement that employers describing plans restate their already-disclosed rights "at every possible opportunity" will at some time be breached even by employers acting in good faith and exercising prudence, as is required by statute. *See* 29 U.S.C. §1104. It also inevitably will prompt a new cottage industry of litigation involving swearing contests by plan beneficiaries who, whether because they simply forgot or misunderstood, assert they relied on the oral "misrepresentation." *Cf. Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 746 (1975) (limiting 10b-5 securities fraud claims to actual purchasers and sellers of securities in part because those who asserted that they held shares in reliance on a misrepresentation would create a cause of action in which "Plaintiff's entire testimony could be dependent upon uncorroborated oral evidence of many of the crucial elements of his claim.") If the court of appeals' decision stands, it:

> "might lead the employer to discontinue giving advice, telling participants to read the documents and draw their own conclusions. That step would protect employers,

but it very likely would increase the level of misunderstanding among participants." *Frahm*, 137 F.3d, at 960.

B. The Decision Below Undermines the Congressional Policies Underlying the Requirement of Written Plan Documents.

The court of appeals' decision also undermines Congress's decision to require that ERISA plans be governed by written documents specifying amendment procedures. 29 U.S.C. §§1102(a)(1), 1102(b)(3). The rationale behind this policy is straightforward:

> "Were all communications between an employer and plan beneficiaries to be considered along with the SPDs as establishing the terms of a welfare plan, the plan documents and the SPDs would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created." *Moore*, 856 F.2d, at 492.

The decision of the court of appeals undercuts the authority of the written plan documents by allowing an employer's representative's oral comments to effectively amend the plan.

The writing requirement serves a dual function. It "protects employees from having their benefits eroded by oral modifications to the plan" and also "protects the plan's actuarial soundness by preventing plan administrators from contracting to pay benefits to persons not entitled to such under the express terms of the plan." *Perreca* v. *Gluck*, 295 F.3d 215, 225 (CA2 2002). "The statutory language of § 1102(a)(1) is clear and concise and must be enforced as written. To hold otherwise would not only thwart congressional purpose and intent, but would afford less protection to employees and their beneficiaries." *Cefalu* v. *B.F. Goodrich Co.*, 871 F.2d 1290, 1296 (CA5 1989).

Recognizing the importance of providing an authoritative, written source for determining a plan's meaning, courts have generally rejected arguments that a plan participant was entitled to vested benefits based on unofficial documents, and even more uniformly have rejected arguments that benefits were vested by oral communications. Participants have tried to argue that benefits were vested under differing legal theories. Some have argued that unofficial communications established new contracts, or modified an ERISA plan, in such a way as to vest benefits. These claims have generally been rejected. *See Alday* v. *Container Corp. of Am.*, 906 F.2d 660, 665 (CA11 1990); *see also Moore*, 856 F.2d, at 488; *Cefalu*, 871 F.2d, at 1295-97; *Musto* v. *Am. Gen. Corp.*, 861 F.2d 897, 910 (CA6 1988); *Cent. States, S.E. & S.W.* v. *Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1149 (CA7 1989). Other claimants have attempted to vest benefits by relying on theories of promissory estoppel, but many circuits have concluded that the prohibition on oral amendments to the plan obviates these claims. *Nachwalter* v. *Christie*, 805 F.2d 956, 960 (CA11 1986) ("We agree with the district court that this requirement that ERISA plans be 'maintained' in writing precludes oral modifications of the Plans; the common law doctrine of estoppel cannot be used to alter this result."); *Perreca*, 295 F.3d, at 231 ("[P]laintiffs' claim of promissory estoppel fails because oral promises are unenforceable under ERISA and therefore cannot vary the terms of an ERISA plan."); *Teamsters & Employers Welfare Trust of Ill.* v. *Gorman Bros. Ready Mix*, 283 F.3d 877, 883 (CA7 2002) ("[E]stoppel can't be used to allow oral representations to expand the terms of an ERISA plan."); *Weir* v. *Fed. Asset Disposition Ass'n*, 123 F.3d 281, 289 (CA5 1997) ("An estoppel cause of action is not cognizable under ERISA in suits seeking to enforce rights to benefits based on purported oral modifications of plan terms."); *Barker* v. *Ceridian Corp.*, 193 F.3d 976, 982 (CA8 1999) ("ERISA precludes oral or informal amendments to a plan,

by estoppel or otherwise."); *White* v. *Provident Life & Acc. Ins. Co.*, 114 F.3d 26, 29 (CA4 1997) ("ERISA simply does not recognize the validity of oral or non-conforming written modifications to ERISA plans."); *but see Kane* v. *Aetna Life Ins.*, 893 F.2d 1283, 1286 (CA11 1990) ("[T]he use of the law of equitable estoppel to enforce oral interpretations of employee benefit plans will not affect the ability of employees and beneficiaries to rely on the written terms of such plans."); *Pisciotta* v. *Teledyne Indus. Inc.*, 91 F.3d 1326, 1331 (CA9 1996) (establishing elements for estoppel based on oral communications).

Without considering the implications, the decision below allows respondents to recover under a theory of breach of fiduciary duty what ERISA's express writing requirement forbids them to recover under theories of contract modification and estoppel. The effect is that the holding of *Varity*, which found a breach of fiduciary duty when an employer made an affirmative misrepresentation in part in written documents describing the plan, has been expanded to find a breach based on an accurate oral description of a plan. *See Varity*, 516 U.S., at 499-501. Allowing an action for breach of fiduciary duty based on oral communications that are *not* misrepresentations, but that simply fail to volunteer information that is in the written plan documents, severely undercuts Congress's goal of limiting informal amendments of ERISA plans, and particularly oral amendments of ERISA plans. It makes no sense that ERISA's fiduciary obligation provision would be read to "take[] back with the left hand the primacy of the written word that ERISA establishes with the right hand." *Frahm*, 137 F.3d, at 960.

Given the emphasis Congress has placed both on allowing employers to create unvested plans, and in limiting informal amendments, breaches of fiduciary duty based on oral

statements should only be found when fiduciaries have made an affirmative misrepresentation, and not on a theory of misrepresentation by omission based on after-the-statement events.

CONCLUSION

For all of these reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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